Cox, F & L & F & G. 24, 62

Motion Papers for Appellees.

IN THE

Supreme Court of the United States.

Filed Apr. 3, 1897.

October Term, 1896, No. ~~614~~ 601.

E. H. HUBBARD, Assignee UNION LOAN AND TRUST COMPANY,

Appellants,

vs.

J. KENNEDY TOD ET AL.,

Appellees.

Office Supreme Court, U. S.
FILED
APR 3 1897
JAMES H. McKENNEY,
CLERK.

No. 713.

SIOUX CITY, O'NEILL AND WESTERN RAILWAY COMPANY,

Appellant,

vs.

MANHATTAN TRUST COMPANY,

Appellee.

No. 719.

SIOUX CITY, O'NEIL AND WESTERN RAILWAY COMPANY AND E. H. HUBBARD, Assignee of the UNION LOAN AND TRUST COMPANY,

Appellants,

vs.

MANHATTAN TRUST COMPANY,

Appellee.

MOTION TO ADVANCE.

GEORGE W. WICKERSHAM,
JOHN L. CADWALADER,
JOHN L. WEBSTER,
Of Counsel with Appellees, for the Motion.

IN THE

Supreme Court of the United States.

1

E. H. HUBBARD, Assignee of the Union Loan and Trust Company, Appellant, vs. J. KENNEDY TOD *et al.*, Appellees.	October Term, No. 614.

2

SIOUX CITY, O'NEILL AND WESTERN RAILWAY COMPANY, Appellant, vs. MANHATTAN TRUST COMPANY, Appellee.	No. 718.

SIOUX CITY, O'NEILL AND WESTERN and E. H. HUBBARD, Assignee of the Union Loan and Trust Company, Appellants, vs. MANHATTAN TRUST COMPANY, Appellee.	No. 719.

3

Motion.

And now come J. Kennedy Tod, William Stewart Tod and Robert E. Tod, appellees in the first above

entitled cause, and Manhattan Trust Company, ap-
4 pellee in the second and third above entitled causes, and move your Honors to advance the said causes and set all of the same for hearing at an early day, to be fixed by the Court, the circumstances of these cases being special and peculiar, within the meaning of Rule 26; and for cause thereof the said appellees respectfully show to the Court the following facts and objects:

The first above entitled cause arose upon an intervening petition filed in a suit brought in the United States Circuit Court, for the District of Iowa, the jurisdiction of which court over said cause depended upon the diversity of citizenship
5 between the parties, the complainant, Manhattan Trust Company, being a corporation of the State of New York, and the defendant, The Sioux City and Northern Railroad Company, a corporation of the State of Iowa, and the suit being a suit of a civil nature in equity, arising upon a bill filed against the Sioux City and Northern Railroad Company by Manhattan Trust Company, as trustee under a certain mortgage executed to it by said Railroad Company to secure an issue of its negotiable bonds, upon allegations showing insolvency and breaches of conditions of the mortgage respecting payment of taxes, suffering prior liens to arise, &c., praying for the appointment of a receiver and for foreclosure, &c.

6 The controversy between Hubbard, assignee, and J. Kennedy Tod *et al.*, arose upon an intervening petition filed in said suit by Hubbard, as statutory assignee for the benefit of the creditors of the Union Loan and Trust Company, an Iowa corporation, acting for the benefit of the holders of commercial paper bearing the endorsement of the said Union Loan and Trust Company aggregating several million dollars in amount, against the members of the firm of J. Kennedy Tod & Co., bankers, in the City of New York. The said firm of J. Kennedy Tod & Company were the holders of 10,600 shares of the capital stock of the

Sioux City and Northern Railroad Company, the defendant to the bill aforesaid, and of $2,340,000 of the first mortgage bonds of the Sioux City, O'Neill and Western Railway, a Nebraska corporation, being the entire issue of the first mortgage bonds of the said company, as pledgees in trust to secure the holders of certain promissory notes amounting to $1,500,000, made by Pacific Short Line Bridge Company and endorsed by one A. S. Garretson. Hubbard, as assignee as aforesaid, on behalf of the holders of the paper endorsed by the Union Loan and Trust Company, claimed that the securities in the hands of J. Kennedy Tod & Co. as aforesaid, previous to their deposit with said firm, had been pledged to the said Union Loan and Trust Company as security for the payment of the notes endorsed by it as aforesaid, and had subsequently been withdrawn without authority, and wrongfully re hypothecated to J. Kennedy Tod & Co., under such circumstances as to charge them with notice of the alleged prior claim of the said Union Loan and Trust Company, and he therefore prayed that J. Kennedy Tod & Co. might be decreed to surrender such securities to him.

At the time of the filing of such petition the District Judge granted an *ex parte* injunction, restraining J. Kennedy Tod & Co. from selling or otherwise disposing of the stock of the Sioux City and Northern Railroad Company, or the bonds of the Sioux City, O'Neill and Western Railway Company. Thereupon J. Kennedy Tod & Co. appeared in the said Circuit Court and answered said petition. Testimony was taken, the cause was heard, and on January 15, 1895, a final decree was rendered in said Court as to the matters contained in the said petition of intervention, whereby it was adjudged that J. Kennedy Tod & Co. had a prior equity in or a lien upon the said securities so in their possession, as collateral security for the payment of the said notes, but that Hubbard as assignee as aforesaid had a junior lien upon the same, and,

10 therefore, adjudging that said assignee be entitled to redeem the said securities in controversy on or before April 21, 1895, upon paying to J. Kennedy Tod & Co., as trustees, the sum of $1,500,000, with interest thereon from December 30, 1892, to date of payment, computed with semi-annual rests upon the 30th days of June and December in each year, according to the terms of the agreement of trust under which the same were held by your petitioners, and in case he failed so to redeem that he be barred and foreclosed of all equity of redemption in such securities.

The said decree, however, further provided that "in case an appeal to the United States Circuit
11 "Court of Appeals from this decree by the inter-"venor shall be taken on or before the 10th day of "March, 1895, then, if this decree be affirmed on "such appeal, the time of redemption shall be ex-"tended until forty-five days after such affirmance" — *thus, in effect, giving to the intervenor a supersedeas pending the appeal, without any bond to secure the respondents against damages by reason of the delay* in case they should ultimately prevail.

At the time of filing the said petition and at the time of the entry of the said decree, the Statutes of the United States then in force, provided that the several Circuit Courts of Appeals should exercise appellate jurisdiction to review final decisions in the existing
12 Circuit Courts in all cases in which the jurisdiction was dependent entirely upon the opposite parties to the suit or controversy being citizens of different States, and that judgments or decrees of the Circuit Courts of Appeals in such cases should be final, excepting that they might at any time certify to this Court any questions or propositions, and excepting also that it should be competent for the Supreme Court to require by *certiorari* or otherwise any such cause to be certified to it for its review and determination (26 Stats., 826).

Appeals were taken by both parties from the said decree to the Circuit Court of Appeals for the

Seventh Circuit, where the said appeals were 13
argued on October 16–17, 1895.

The second and third above entitled causes se upon a bill filed October 30, 1893, in the U. S ircuit Court, District of Nebraska, by Manhattan Trust Company, a New York corporation, against the Sioux City, O'Neill and Western Railway Company, a Nebraska railroad corporation, to foreclose a mortgage made by the defendant to the complainant to secure the issue of $2,340,000 of its first mortgage bonds, all of which had been pledged to J. Kennedy Tod & Company in trust, as above stated.

Some time after the filing of the petition of intervention above referred to in the Iowa cause, Hub- 14
bard, assignee of the Union Loan and Trust Company, who upon his appointment as such had come into the possession of all of the stock of the Sioux City, O'Neill and Western Railway Co., caused an answer to be filed in the name of said railway company to the Manhattan Trust Company's bill of foreclosure against the Sioux City, O'Neill and Western Railway Company, in which answer it undertook to deny its incorporation, the validity of its own mortgage and bonds, and also to aver as a defense to that suit a great many of the facts constituting the claim of Hubbard, assignee, to the ownership of the Sioux City, O'Neill and Western bonds already in litigation in the Iowa suit.

15

Exceptions were filed by the plaintiff to practically all of this answer as impertinent, &c.; the exceptions were sustained by the Court, and the portions excepted to expunged therefrom.

The said railroad company also filed a cross-bill in that suit against the Manhattan Trust Company *and* the members of the firm of J. Kennedy Tod & Company,—who were not parties to the suit,—again endeavoring to incorporate in that suit the same questions which were in litigation in the Iowa cause. To that cross-bill the plaintiff demurred and that de-

16 murrer was sustained by the Court and the cross-bill dismissed.

Hubbard, assignee of the Union Loan and Trust Company, also applied to the Court for leave to file a petition of intervention in the cause, setting up substantially the same claim as he was litigating in the Iowa suit, and that motion was denied. From the order denying such motion Hubbard appealed to the Circuit Court of Appeals. Testimony was taken, the cause heard and a decree of foreclosure and sale was granted, from which the railroad company appealed to the Circuit Court of Appeals.

These appeals came on to be heard and were argued in the Court of Appeals at the same time as
17 the appeals in Hubbard *vs.* Tod.

On April 13, 1896, the Court of Appeals, by a divided Court, rendered a decision affirming the decrees of the courts below in all of the cases, with costs, no opinion being filed.

On May 1, 1896, Hubbard, assignee, filed a petition for a rehearing, and a few days later obtained twenty-five days further time within which to file an additional brief in support of such petition. On May 28th, he filed such further brief. Petitions for rehearing in said Court are considered *ex parte*, and therefore the appellees were not heard either orally or by brief in opposition to the motion for rehearing.

18 On June 22, 1896, the Court denied said motions, filing a *per curiam* opinion in which it was stated that the only questions of difference between the judges in the case of Hubbard *vs.* Tod, were as to whether or not the appellants' right of redemption had been barred or foreclosed, or was still in existence; one of the judges being of the opinion that such right existed, and other being of the contrary opinion—that in the other cases they had concluded that no sale of the Sioux City, O'Neill and Western Railroad should be had until Hubbard, assignee, determined whether or not he would exercise the right to redeem the bonds granted to him in Hub-

bard *vs.* Tod, and therefore the decrees of affirm- 19
ance were vacated and the cases restored to the docket to await the further orders of the Court. The appellants thereupon procured, also *ex parte*, an order from the Circuit Court staying the issuance of the mandate in Hubbard *vs.* Tod, until the following October, for the purpose of allowing Hubbard, assignee, to make an application to the Supreme Court for a *certiorari* to bring up the case for review. Such application was made to the Court at the opening of the October Term, and was granted October 19th, 1896, *one year after the argument of the case in the Court of Appeals.* The record has been filed in this Court.

The appellants in the Sioux City, O'Neill and West- 20
ern cases thereupon applied to the Circuit Court of Appeals to certify questions in those cases to this Court, and in response thereto the Circuit Court of Appeals has certified to this Court certain questions arising in those cases upon which they ask its instructions.

In January, 1893, $1,500,000 of notes of the Pacific Short Line Bridge Company, endorsed by A. S. Garretson, were sold in New York for cash, at their face value, to parties who purchased the same in reliance upon the security furnished by the pledge to J. Kennedy Tod & Company of the entire issue of Sioux City, O'Neill and Western bonds and 10,600 shares of the stock of the Sioux City and Northern Rail- 21
road. Not one dollar of principal or interest has ever been repaid upon that advance, and the holders of such notes have since October, 1893, been prevented from realizing upon their security by the claim to a paramount and prior lien upon their said security interposed by the assignee of the Union Loan and Trust Company on behalf of the holders of unsecured notes endorsed by the Union Loan and Trust Company, which notes contained no reference to any collateral or any security for their repayment, and were purchased without any inquiry by any of the holders as to

22 whether or not any security was ever pledged or agreed to be pledged as security for the payment of the said notes or any part of them.

Owing to the failure of Garretson and his associates and of the various corporations in which they were interested, in the spring of 1893, the holders of the notes secured by the pledge of the securities aforesaid with J. Kennedy Tod & Co. were deprived of any means of enforcing payment of the same, except by the realization of their said collateral.

The affairs of the two railroad companies whose securities constitute such collateral were found to be greatly complicated; taxes for two or three years had been allowed to accumulate and wages of em-
23 ployees were unpaid. Garretson and his associates had involved the Sioux City and Northern Railroad in burdensome contracts of complicated nature, and a Receivership of each railroad was necessary for protection against a multitude of suits and possible disintegration. Judge Shiras appointed *two* persons Receivers of the Sioux City and Northern Railroad,—about 100 miles in length. Judge Caldwell appointed *one* Receiver of the Sioux City, O'Neill and Western Railway, and both properties have since October, 1893, been in the hands of the Courts.

There is a mortgage of $1,940,000 on the Sioux City and Northern Railroad, on which no interest
24 has been paid since May, 1893. Interest is accumulating on this debt. The railroad in the Receiver's hands has not earned enough to pay the mortgage interest. Properly administered in the hands of its owners, the road could be made to earn its interest and a dividend upon its stock; but in the present state of affairs whoever may be ultimately adjudged to be the owner of the property is suffering daily loss by a continuance of the receivership, and the inability to properly organize, manage and develop the railroads.

Nor is this merely a *private* injury. While these suits are pending, the ownership of these two rail-

roads is left in an uncertain condition, and one of 25
them is burdened with the expense of a dual receivership, while the other, whose only real value consists in its possible union with some larger system, is maintaining a precarious existence, deprived of anything but a petty local traffic, and can be of value to none until after a reorganization, while the interests of the public in the country through which the railroads are constructed cannot be properly served under a receivership, however competent.

The ownership and condition of these two railroads is a matter of general public interest.

As this Court said in *Barton* v. *Barbour*, 104 U. S., 135, "A railroad is authorized to be constructed "more for the public good to be subserved than for 26
"private gain. As a highway for public transpor-"tation, it is a matter of public concern, and its "construction and management belong primarily to "the Commonwealth."

In fact this Court has by granting the writ of *certiorari* in *Hubbard* v. *Tod*, in effect decided that that case is one of great public importance and interest; for it has expressly ruled that the discretionary power to bring up for review cases decided in the Courts of Appeal will only be exercised in cases of peculiar gravity, and general importance.

American Construction Co. *vs.* Jacksonville R. R. Co., 148 U. S., 373.

27

The same considerations which led to the granting of the *certiorari* would seem to require that such relief should be coupled with an advancement of the case so as to insure a speedy hearing. The parties have already been subjected to one appeal, which when taken and when argued they had every reason to believe was final. The decision on such appeal was reached after months of deliberation by the Appellate Court, in fact the cases were *in gremio legis* almost one year—long enough to grind out exact justice. The parties are now subjected to the delay and expense

of a further appeal. At least they may with propriety ask for an early hearing.

There is a peculiar need of such consideration here, for while every day's delay tends to diminish the value of the securities in controversy, by the rapid accumulation of interest and the smaller earnings while in the hands of receivers, yet the appellees and their beneficiaries are without any possible redress for such loss in case their right to the securities should be confirmed by this Court.

The Circuit Court adjudged a prior equity to be in J. Kennedy Tod & Co. as trustees, and that nothing could take from them their prior right to the said securities for the payment of their advances. The Court, nevertheless, gave to the intervenor a right of redemption *based upon the terms of the very contract*, which provided the means of selling the securities free from such right of redemption by the pledgees *which had been exercised*, but the validity of which the Court denied, and then so framed the decree as to grant the intervenor a *supersedeas until forty-five days after the affirmance on appeal, without requiring any bond or other security to protect these appellees against loss in the event of such affirmance*, and this although the intervenor had based his entire case upon a claim to a prior and adverse right, had never sought to redeem by paying the lien in favor of J. Kennedy Tod & Co., or any part thereof, and had never tendered nor offered to pay the same or any part thereof, and has always admitted his entire unwillingness and inability to avail of the right to redeem given by the Court.

The Sioux City, O'Neill & Western cases should be heard with Hubbard *vs.* Tod, as they involve the right of enforcement of the mortgage securing the bonds, title to which is in controversy in *Hubbard* vs. *Tod*.

It is believed that the appellants will concur in this application.

For all of these considerations it is respectfully 31
prayed that these causes may be advanced upon your docket and may be heard together at an early day to be fixed by your Honors in preference to the general causes pending upon your docket.

GEORGE W. WICKERSHAM,
JOHN L. CADWALADER,
JOHN L. WEBSTER,
Of Counsel with Appellees, for the Motion.